

**United States Small Business Administration
Office of Hearings and Appeals**

SIZE APPEAL OF:

Davis Defense Group, Inc.,

Appellant,

RE: MLT Systems, LLC

Appealed From
Size Determination No. 02-2019-060

SBA No. SIZ-6016

Decided: July 16, 2019

ORDER DENYING APPEAL^{1, 2}

I. Introduction

On April 29, 2019, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area II (Area Office) issued Size Determination No. 02-2019-060, dismissing a size protest filed by Davis Defense Group, Inc. (Appellant) against MLT Systems, LLC (MLT). The Area Office found that Appellant's protest was untimely, and that Appellant also lacked standing to protest. Appellant received the size determination on April 30, 2019 and filed the instant appeal within 15 days thereafter, so the appeal is timely. 13 C.F.R. § 134.304(a). For the reasons discussed *infra*, the appeal is denied, and the size determination is affirmed.

II. Background

On July 18, 2018, the U.S. Marine Corps Systems Command (Corps) issued Solicitation No. M67854-18-R-3005 for acquisition, logistics, engineering, test and evaluation, and program support services. The solicitation contemplated the award of a task order under the SeaPort-e multiple-award indefinite-delivery indefinite-quantity (ID/IQ) contracts. The Contracting Officer (CO) set aside the order for SeaPort-e small business prime contractors, but did not require that offerors recertify size. (Solicitation at 72.) Proposals were due August 23, 2018.

¹ This appeal is decided under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 121 and 134.

² This decision was originally issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded counsel an opportunity to file a request for redactions if desired. No redactions were requested, so OHA now issues the entire decision for public release.

On April 1, 2019, Appellant was notified that MLT was the apparent awardee, and that the Corps had rated Appellant's own proposal "Unacceptable" for the Technical evaluation factor. More specifically, the Corps identified several weaknesses and significant weaknesses in Appellant's proposal, which, in the view of the Corps, "increase[d] the risk of unsuccessful contract performance to an unacceptable level, resulting in a Deficiency." (Debriefing at 11 n.1.) On April 8, 2019, Appellant filed a size protest with the CO, alleging that MLT is not a small business due to affiliation with other concerns under the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4). The CO forwarded the protest to the Area Office for review, but urged that "this protest should be dismissed immediately" because Appellant's proposal was considered "Unacceptable" for the Technical factor and therefore was ineligible for award. (Letter from C. Bradshaw to A. Kim (April 9, 2019), at 2.) In response to a follow-up inquiry from the Area Office, the CO stated that "We did not require an explicit size certification for this task order." (E-mail from C. Bradshaw to H. Goza (April 10, 2019).)

III. Size Determination

On April 29, 2019, the Area Office dismissed Appellant's protest as untimely and for lack of standing. The Area Office explained that the protest was untimely because it was filed against a task order under a long-term contract, and the CO did not require recertification. (Size Determination at 1.) SBA regulations permit a size protest to be filed at three stages during the life of a long-term contract: (1) when the contract is initially awarded, (2) when an option is exercised, and (3) when a CO requests recertification in conjunction with a particular order. (*Id.*, citing 13 C.F.R. § 121.1004(a)(3).) Recertification was not required for the instant task order, and Appellant's protest was not timely filed within five business days after award of the base contract or the exercise of an option. As a result, the protest was untimely. (*Id.* at 1-2.)

The Area Office further found that Appellant lacked standing to protest due to its Technical rating of "Unacceptable." (*Id.* at 2.) Because Appellant was eliminated from the competition for reasons unrelated to size, Appellant did not have standing to challenge the size of MLT. (*Id.*, citing 13 C.F.R. § 121.1001(a)(1)(i).)

IV. Appeal

On May 15, 2019, Appellant filed the instant appeal. Appellant argues that the Area Office committed two errors in its review. First, the Area Office failed to analyze Appellant's ostensible subcontractor allegations, which would have rendered MLT other than small and ineligible for award. (Appeal at 1-2.) Second, the Area Office could not properly conclude that Appellant lacked standing to protest because Appellant is disputing its "Unacceptable" rating through a bid protest filed at the U.S. Government Accountability Office (GAO). (*Id.* at 2.)

Appellant maintains that the Area Office "ignore[d] the directive found under [13 C.F.R. §] 121.404(g)(5) for a contractor that has formed an ostensible subcontractor relationship to recertify its size." (*Id.* at 6.) In Appellant's view, § 121.404(g)(5) constitutes an exception to the timeliness requirements of 13 C.F.R. § 121.1004(a)(3) because "the formation of an ostensible subcontractor relationship creates an obligation for a contractor that has previously represented its small business size status on a multiple award contract to rerepresent its size status to the

contracting agency.” (*Id.*) The size protest was connected to the recertification that MLT made upon creation of its ostensible subcontractor relationships, so the protest was timely. (*Id.* at 7-12.)

Appellant contends that the Area Office also erred in dismissing the protest for lack of standing. Dismissal of Appellant's protest was premature, as Appellant's “technical rating may change if GAO agrees” with the bid protest. (*Id.* at 13.) Appellant asserts that “[i]t is routine for SBA to stay the proceedings in a size determination pending the resolution of a concurrently-filed GAO bid protest.” (*Id.*, citing *Size Appeal of HRCI-MPSC PASS, LLC*, SBA No. SIZ-5500 (2013).)

V. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeal. Specifically, Appellant must prove the size determination is based upon a clear error of fact or law. 13 C.F.R. § 134.314. The Office of Hearings and Appeals (OHA) will disturb an area office's size determination only if, after reviewing the record, the administrative judge has a definite and firm conviction that the area office erred in making its key findings of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

B. Analysis

Appellant has not shown clear error in the size determination. Therefore, this appeal must be denied.

With regard to the question of protest timeliness, it is well-settled law that a size protest filed against an order under a long-term contract is timely only if the CO requested recertification in conjunction with that order. 13 C.F.R. § 121.1004(a)(3); *Size Appeals of DNT Sols., LLC and Alliant Sols. Partner, LLC*, SBA No. SIZ-5962, at 10 (2018); *Size Appeal of Unissant, Inc.*, SBA No. SIZ-5871, at 4-5 (2017); *Size Appeal of Oxford Gov't Consulting, LLC*, SBA No. SIZ-5732, at 2 (2016). Here, the Area Office determined, and Appellant does not dispute, that the instant procurement involved an order under a long-term contract, and that the CO did not request recertification for the instant task order. Sections II and III, *supra*. Thus, the Area Office properly found that the protest was not timely filed within five business days after award of an order that required recertification. Appellant's assertion that 13 C.F.R. § 121.404(g)(5) constitutes an exception to the protest timeliness requirements of 13 C.F.R. § 121.1004(a)(3) is meritless, and OHA has rejected similar arguments in prior decisions. *Size Appeal of U.S. Info. Techs. Corp.*, SBA No. SIZ-5585, at 7 (2014) (“The plain text of § 121.404(g)(5) cannot reasonably be held to create an exception to the time limits enumerated at § 121.1004.”); *Size Appeal of Strata-G Sols., Inc.*, SBA No. SIZ-5563 (2014). Accordingly, Appellant has not shown that the Area Office erred in dismissing Appellant's protest as untimely.

The Area Office also found that Appellant lacked standing to protest, because the procuring agency deemed Appellant's proposal “Unacceptable” for the Technical evaluation

factor. Sections II and III, *supra*. SBA regulations permit that an unsuccessful offeror may pursue a size protest only if that offeror has not been “eliminated from consideration for any procurement-related reason, such as non-responsiveness, technical unacceptability, or outside of the competitive range.” 13 C.F.R. § 121.1001(a)(1)(i). In other words, “a technically unacceptable offeror is barred from bringing a size protest.” *Size Appeal of ILKA Techs., Inc.*, SBA No. SIZ-5903, at 2 (2018) (quoting *Size Appeal of Lost Creek Holdings, LLC d/b/a All-Star Health Sols.*, SBA No. SIZ-5823, at 3 (2017)).

Appellant does not dispute that its proposal was rated “Unacceptable” for the Technical evaluation factor and therefore was ineligible for award. Appellant contends, however, that the Area Office prematurely dismissed the size protest in light of Appellant's pending bid protest at GAO. Appellant cites *Size Appeal of HRCI-MPSC PASS, LLC*, SBA No. SIZ-5500 (2013) for the proposition that SBA routinely stays size proceedings pending the outcome of a concurrent GAO protest.

I find no merit to Appellant's argument. It is true that OHA will stay size appeal proceedings when a GAO protest prompts corrective action, and such corrective action has “the potential to alter the outcome of the source selection.” *Size Appeal of Synaptex Corp.*, SBA No. SIZ-5954, at 22 (2018). Here, though, there is no indication that the procuring agency intends to undertake corrective action based on Appellant's bid protest. Absent corrective action, the mere fact that a size protester files a concurrent bid protest challenging its evaluation does not normally result in a stay of proceedings. *See, e.g., Size Appeal of KAES Enters., LLC*, SBA No. SIZ-5435 (2013) (PFR). Therefore, the Area Office did not clearly err in dismissing Appellant's protest for lack of standing under 13 C.F.R. § 121.1001(a)(1)(i).

VI. Conclusion

For the above reasons, I DENY the instant appeal and AFFIRM the size determination. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge